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No. 74-1075

# In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT F. DEVITT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1974

## NO.

ROBERT F. DEVITT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert F. Devitt, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### Judgment Below

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

### Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1974. Petition for rehearing, timely filed, was denied on January 28, 1975. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

## Questions Presented

1. Did the indictment sufficiently allege, and was the evidence sufficient to prove, that the alleged false statements were made while petitioner was under an oath administered by one authorized by law to administer oaths, an essential element of the offense? Moreover, did not the trial court invade the province of the jury and deprive petitioner of his constitutional rights to a fair trial and to have the jury instructed on all essential elements of the offense, in that the trial court failed to instruct the jury concerning this essential element?

2. Was not the jury improperly instructed, in that:

   A. The court failed to instruct the jury that they must find that petitioner was sworn by one with legal authority to administer oaths, an element of the offense?

   B. Under the court's instructions, the jury could convict petitioner upon proof of facts which were insufficient as a matter of law to establish commission of the offense?

3. Did not application to petitioner of 18 U.S.C. 1623 (false declarations before grand jury or court) instead of the general perjury statute, 18 U.S.C. 1621, within the unbridled discretion of the prosecution, deprive petitioner of his constitutional right to equal protection of the laws, since the more general perjury statute, which is also applicable, puts the government to a greater burden of proof to establish violation of the law?

4. Did not the court improperly determine that petitioner's alleged false statements were material as a matter of law to the grand jury investigation, where the grand jury's inquiry of petitioner was not pursuant to any legitimate grand jury function, since the grand jury

already had sufficient information from independent sources upon which to vote an indictment against petitioner without summoning him? Moreover, did not the grand jury act in bad faith, as illustrated by the grand jury's asking petitioner about matters as to which the statute of limitations for substantive criminal prosecution had expired, and by asking him anything at all under the circumstances, since the grand jury already knew what it wanted to know from independent sources other than petitioner? And can petitioner's conviction stand where the grand jury before which petitioner allegedly made false declarations was not acting as a properly constituted entity?

5. Was not the evidence insufficient, since there was no evidence that petitioner believed his answers (that he did not recall or did not remember certain things) to be false when he gave them, there being nothing in the record other than bald conjecture to support the conclusion that when he gave those answers, petitioner did not believe them to be true?

6. Was not petitioner convicted solely on the basis of his grand jury testimony which was coerced in violation of his Fifth Amendment rights by virtue of Chicago Police Department Rule 51, since declared unconstitutional?

**Constitutional Provisions, Statutes and Rule Involved**

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Title 18, U.S.C., Section 1623 (for violation of which petitioner was indicted and convicted) is as follows:

> **"§ 1623. False declarations before grand jury or court**
>
> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

The more general perjury statute applicable to petitioner's alleged conduct could have been, but was not, invoked, reads:

> **"§ 1621. Perjury generally**
>
> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Chicago Police Department Rule 51 (in effect at the time petitioner was summoned before the grand jury) authorized suspension or discharge from the Department of police officers who violated said Rule, which prohibited Chicago Police Officers from:

> "Failing to give evidence before the Grand Jury . . . when properly called upon to do so, or refusing to testify on the grounds that such testimony might incriminate the member, or refusing to sign a waiver of immunity when requested to do so by a superior officer."

## STATEMENT OF THE CASE

Petitioner, Robert F. Devitt, was indicted for having made false statements before a grand jury in violation of 18 U.S.C. Sec. 1623. (A. 1-3) [1] Petitioner's motion to dismiss the indictment (A. 5) was denied. (A. 4) The jury found petitioner guilty, (A. 4) and the court sentenced him to 3 years imprisonment. (A. 7) The Court of Appeals affirmed. (App. A) Petitioner remains free on bond pending adjudication of the instant Petition.

Petitioner, a twenty-year veteran with the Chicago Police Department, was subpoenaed to appear before the Special February 1971 Grand Jury on Feb. 23, 1972. (Tr. 10) When asked whether he had ever accepted money from any person, or from any tavern owner or employee in connection with his employment as a police officer, petitioner responded, "I don't recall," or "I don't remember." (Tr. 197-210) As a result of these answers disclaiming recollection of having accepted money as aforesaid, petitioner was indicted for having made false declarations to the grand jury. (A. 1-3)

---

[1] "A." refers to petitioner's Appendix to his Brief filed in the Court of Appeals for the Seventh Circuit, No. 73-1691. "Tr." refers to the Transcript of Proceedings at trial.

The government put on evidence purporting to establish that petitioner was under oath when he testified before the grand jury. (Tr. 8-12)

At trial, four individuals—Thomas McCauley (Tr. 27-82), Mary McCracken (Tr. 83-136), Johnnie Lee Davis (Tr. 137-71), and Donald Joras (Tr. 217-33)—testified that they gave petitioner various sums of money for various official favors involving taverns with which they were connected during the years 1964, 1965, 1966 and possibly 1967. Each witness testified only to a single transaction.

There was no direct evidence tending to show that when he gave his answers to the grand jury, petitioner believed those answers to be false. The only evidence was as above, that is, that the named individuals claimed they gave petitioner money.

Petitioner denied each of the incidents, and maintained that when he gave his anwers to the grand jury, he believed them to be true. (Tr. 358-78) Petitioner further testified that, during the 20 years he was employed as a Chicago Police Officer, he received various monetary awards from businessmen's groups for meritorious service in the line of duty. (Tr. 378-83)

## REASONS FOR GRANTING THE WRIT

### 1.

**The indictment did not sufficiently allege, and the evidence was insufficient to prove, that the alleged false statements were made while petitioner was under an oath administered by one authorized by law to administer oaths, an essential element of the offense. Moreover, the trial court invaded the province of the jury and deprived petitioner of his constitutional rights to a fair trial and to have the jury instructed on all essential elements of the offense, in that the trial court failed to instruct the jury concerning this essential element.**

#### A. The Indictment

Petitioner moved to dismiss the indictment, alleging, *inter alia,* that the purported allegation concerning defendant's alleged oath was insufficient.[2] (A. 5) The motion to dismiss was denied. (A. 4)

While petitioner was indicted under 18 U.S.C. 1623 rather than under the more general perjury statute, 18 U.S.C. 1621,[3] still it is required as an element of proof

[2] The indictment alleged only as follows concerning this matter: "1. On February 23, 1972, at Chicago, in the Northern District of Illinois, Eastern Division, Robert F. DeVitt, defendant herein, while under oath as a witness before the Special February 1971 grand jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Illinois and inquiring for said District in a case then and there pending before the said grand jury, did knowingly make a false material declaration." (A. 1)

[3] See Point 3 *infra* for the argument that this selection of charge denied petitioner equal protection of the laws.

under Sec. 1623 that the defendant had been under oath at the time the declarations were made. Sec. 1623(a) begins, "Whoever under oath in any proceeding before . . . any . . . grand jury of the United States. . . ."

Because of its relative recency,[4] Sec. 1623 has thus far been the subject of only a few reported decisions, none of which deals with the element of the oath. Recourse to cases interpreting this element of the more general perjury statute (Sec. 1621) provides persuasive authority for this same element under Sec. 1623.

The allegation concerning petitioner's oath in the case at bar is virtually identical in import and in deficiency to that held insufficient to allege violation of Sec. 1621 in *United States* v. *Borrelli*, 217 F. Supp. 899 (E.D. Pa. 1963). There, while the indictment alleged (as here) that defendants had taken an oath, and also alleged (as here) that a particular grand jury, properly impaneled and sworn, was involved (*id.* at 900), the indictment there (as here) failed to allege before what individual or tribunal defendants had been sworn.[5] Granting defendants' motion to dismiss the

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[4] 18 U.S.C. 1623 was first enacted on Oct. 15, 1970. 84 Stat. 932.

[5] In *Borelli*, "each indictment read in material part as follows:

'[t]he defendant herein, having taken an oath before a competent tribunal that he would testify truly in a case in which a law of the United States authorized an oath to be administered, did unlawfully, wilfully, and knowingly, and contrary to said oath, state material matter which he did not believe to be true, that is to say:

'2. That at the time and place aforesaid the Grand Jury of the United States, duly empaneled and sworn in the United States District Court for the Eastern District of Pennsylvania was inquiring into alleged violations of Sections 1952 and 371 of Title 18, United States Code.'" *United States* v. *Borelli*, 217 F.Supp. 899, 900 (E.D. Pa. 1963).

indictment, the District Court held:

> "Basic among the elements of the crime defined by 18 U.S.C. § 1621 is the taking of an oath before a *competent* tribunal, officer, or person to testify truly. The actual identity of the tribunal, officer, or person, therefore, is central to every prosecution under this statute. Yet these indictments nowhere identify or particularize the tribunal which administered the oaths. They clearly do not charge that the defendants took the respective oaths before the grand jury. It was not sufficient in this situation that the indictments charged the offense in the same general terms as the statute." *Ibid.* (Emphasis in original.)

The Court of Appeals herein summarily rejected petitioner's contention in this regard, without citation of authority concluding that Sec. 1623 contained no requirement that the oath be administered by one with authority to administer oaths. (App. A, p. 3) Inasmuch as this is a requirement under Sec. 1621, this Court should grant certiorari to make the determination whether or not Sec. 1623 contains a like requirement, which determination has not been, but should be, made by this Court. See Supreme Court Rule 19(1)(b).

Because here it was not alleged in the indictment that petitioner was sworn before an entity or individual authorized by law to administer oaths, the court erred in denying his motion to dismiss the indictment, petitioner's conviction, based upon this invalid indictment, should be reversed.

### B. The Evidence

Even if it be held that the indictment was sufficient to withstand the petitioner's attack, proof of the element of

oath at trial was deficient.[6] The evidence, purporting to establish that petitioner was duly sworn as required for conviction under Sec. 1623, failed properly to establish this essential element.

In *Smith* v. *United States*, 363 F.2d 143 (5 Cir. 1966),[7] the court reversed and remanded defendant's conviction under Sec. 1621, holding:

> "Proof of the charge requires that sufficient evidence be adduced before the jury upon which it can be found beyond a reasonable doubt that an oath was administered to the defendant by some officer authorized to do so." *Id.* at 144.

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[6] The government's attempts to establish this element are as follows: Herbert Biegel testified that when defendant appeared befor the grand jury, he, Biegel, was a U.S. Department of Justice Attorney, supervising and conducting the grand jury investigation in question. (Tr. 8-11) Prior to being questioned, Biegel testified, petitioner took an oath administered by "the Foreman of that Grand Jury . . . I believe his name was Eldred Dusole." (Tr. 12) Biegel testified that petitioner was given the following oath: "You do solemnly swear that the testimony you are about to give before this Grand Jury will be the truth, the whole truth and nothing but the truth, so help you God," and that he answered, "I do." (Tr. 12) Also admitted into evidence was a stipulation as to the testimony of the court reporter who transcribed petitioner's grand jury testimony of Feb. 23, 1972. (Tr. 12, 191-92) While petitioner stipulated that she would so testify, he again raised the objection that such stipulation could not cure the defect in the indictment. (Tr. 191-92) The transcript of petitioner's grand jury testimony begins:

> "Robert Devitt, having been first duly sworn by the Foreman to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows: . . ." (Tr. 192)

[7] Affirmed after remand and retrial, 392 F.2d 169 (5 Cir. 1968), in an opinion not here pertinent.

The court reporter's "usual prefatory statement," that "Petitioner, Joe Smith, having been duly sworn . . .," was held insufficient. *Id.* at 145.

> "The bare statement . . . is a mere *ex parte,* unsworn conclusion by the reporter that appellant had been sworn." *Ibid.*

*Compare United States* v. *Edwards,* 443 F.2d 1286, 1290-91 (8 Cir. 1971), where the court affirmed, distinguishing *Smith, supra,* on the basis that in *Edwards,* defendant had stipulated that he had taken an oath. The stipulation in the case at bar does not remedy the deficiency, since here the stipulation did not extend to petitioner's having been under oath. (See Tr. 12, 191-92)

Nor did Biegel's testimony suffice. For although he testified that petitioner was given an oath by the grand jury Foreman, whom Biegel believed was named Eldred Dusole, (Tr. 12) there was absolutely no evidence from which the jury could properly determine that that individual had the authority to administer oaths.

Because of this fatal insufficiency in the proof, petitioner's conviction may not stand.

### C. The Instructions

The court's failure to instruct the jury that, before a verdict of guilty could be returned, the jury must find, as an element of the offense, that petitioner was under oath administered by one competent to administer oaths, was fatal error.

It was incumbent upon the court to advise the jury of all essential elements of the offense. By not instructing as to the necessity that the jury find that petitioner was

under oath administered by one authorized to administer oaths, the court failed in its duty to instruct upon all essential elements of the offense.

> "In the final analysis it is not the parties who determine the charge the judge gives to the jury, the obligation rests squarely on the shoulders of the trial judge." *Williamson* v. *United States,* 332 F.2d 123, 132 (5 Cir. 1962).

And this Court has held in its reversal in *Screws* v. *United States,* 325 U.S. 91 (1944):

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion." *Id.* at 107.

*Accord, Byrd* v. *United States,* 342 F.2d 939, 941 (D.C. Cir. 1965); *Morris* v. *United States,* 156 F.2d 525, 527, 529 (9 Cir. 1946).

Moreover, instructions which, as in the case at bar, effectively remove from the jury's consideration an essential element of the offense, invade the province of the jury and are constitutionally infirm as amounting to partial direction of a verdict of guilty, in violation of due process of law and the Sixth Amendment. *Mims* v. *United States,* 375 F. 2d 135, 148 (5 Cir. 1967); *United States* v. *Skinner,* 437 F. 2d 164 (5 Cir. 1971); *United States* v. *Raub,* 177 F.2d 312, 316 (7 Cir. 1949); *United States* v. *Gollin,* 166 F.2d 123, 126 (3 Cir. 1948).

In the case at bar, Instructions 27 and 28 purport to be "elements of the offense" instructions.[8] It is obvious that

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[8] Instruction No. 27, as follows:

"In order to convict the defendant Robert F. Devitt of the crime of false declarations charged in this indictment, the government must have proven the following beyond a reasonable doubt:

"1. That on February 23, 1972, the defendant Robert F. Devitt appeared before the Special February 1971 Grand Jury of the United States District Court for the Northern District of Illinois;

"2. That the defendant Robert F. Devitt took an oath that he would testify truly; and

"3. That he then and there made the declarations set out in the indictment;

"4. That the declarations were false; and

"5. That the defendant knew they were false when he made them." (A. 5)

Instruction No 28, as follows:

"Whether a declaration made by a witness before a Federal Grand Jury is material to the investigation then being conducted by the Federal Grand Jury is a question of law to be decided by the trial judge, and is not a matter to be determined by the jury.

"Therefore, you are hereby instructed that if you find that the defendant Robert F. Devitt did testify before the Federal Grand Jury in substance to those declarations set forth in the indictment, then those declarations would be material to the investigation then being conducted by the Federal Grand Jury as a matter of law.

"Therefore, you are hereby instructed that as to the indictment it is the jury's function to determine whether or not the government has proven beyond a reasonable doubt that the defendant Robert F. Devitt did knowingly make under oath the declarations before the Federal Grand Jury that are set forth in the indictment. If you determine that the defendant Robert F. Devitt did make these declarations under oath, before the Federal Grand Jury, then you must determine whether or not the government has proven beyond a reasonable doubt that those declarations were false and that the defendant Robert F. Devitt knew they were false when he made the declarations." (A. 5-6)

omitted from these instructions, and indeed, from the instructions as a whole (see Tr. 451-66), is any requirement that, before conviction, the jury must find that petitioner was sworn by one competent to swear persons to testify truthfully.

In *Brooks* v. *United States,* 240 F.2d 905 (5 Cir. 1957), the trial court had charged the jury that the IRS special agent who allegedly administered the oath to defendant was authorized to administer said oath. The reviewing court reversed and remanded, holding that it was a question of fact for the jury to determine whether or not the person who administered the oath had power so to do. The trial court's instruction to the contrary amounted to a violation of defendant's right to trial by jury:

> "Heinous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizen in order to punish it." *Id.* at 906.

See also *Harrell* v. *United States,* 220 F.2d 516 (5 Cir. 1955), where the court affirmed, finding that the trial court had properly instructed the jury, as required by law, that proof that the oath was administered by one authorized to administer oaths is essential. *Id.* at 522 n.5.

Certiorari should be allowed so that this Court may rule upon an important question of federal law——whether the oath requirement must be subject of a jury instruction as an essential element of the offense defined by Sec. 1623—which question has not been, but should be, resolved by this Court. See Supreme Court Rule 19(1)(b).

2.

**The jury was improperly instructed.**

**(A) The court failed to instruct the jury that they must find that petitioner was sworn by one with legal authority to administer oaths, an element of the offense;**

**(B) Under the court's instructions, the jury could convict petitioner upon proofs of facts which were insufficient as a matter of law to establish commission of the offense.**

**A.**

Petitioner relies upon and incorporates by reference herein Point 1C of his Petition, pp. 11-14, *supra*, to establish his position that failure to instruct the jury as to the particulars of the oath requirement constitutes reversible error. (See Inst. 27 & 28, A. 5-6, Tr. 463-64)

**B.**

Instruction 29 (A. 6-7, Tr. 464) reads as follows:

> "The indictment alleges that Robert F. Devitt accepted money from Thomas McCauley, Johnnie Lee Davis, Mary McCracken and Donald Joras. If you find beyond a reasonable doubt that Robert F. Devitt did accept money from any one or more of those persons, and if you also find beyond a reasonable doubt that at the time he testified before the Federal Grand Jury he did recall, remember or have any knowledge of having accepted money from any one or more of those persons, then that is sufficient to convict."

The vice of this instruction is that it omits the factor, present in the grand jury questioning and in the indictment, that when petitioner allegedly accepted money from these individuals, he did so *in the performance of his duties*

*as a Chicago police officer.* Under the instruction above set forth, conviction could result upon proof that petitioner received money from any of these persons in *any* capacity, even if in repayment of a loan or other legitimate business obligation. In other words, it does not limit conviction to circumstances falling within the scope of the grand jury questioning and the entire tenor of the investigation and of petitioner's trial.

Thus, under this instruction, petitioner could have been convicted upon a set of facts not contemplated by the grand jury which indicted him, in violation of his constitutional rights.[9] *Stirone* v. *United States,* 361 U.S. 212, (1960); *United States* v. *Roach,* 321 F.2d 1 (3 Cir. 1963); *cf. Street* v. *New York,* 394 U.S. 576, 585-86 (1969); *United States* v. *Tomasetta,* 429 F.2d 978 (1 Cir. 1970). Petitioner's conviction must therefore be reversed.

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[9] The Court of Appeals affirmed on the basis that other instructions told the jury of the necessity of petitioner's having acted in his capacity as a police officer as prerequisite to conviction. (App. A. p. 3) However, the court has overlooked the impact of Instruction 29 in its form as an "if-then" instruction; *i.e.,* the jury is specifically told that if they find certain facts, then they should convict. Thus there is a very real possibility that petitioner may stand convicted on the basis of conduct not constituting the violation charged. It cannot be presumed that the jury disregarded the clear, but erroneous, mandate to them by the trial court in the form of Instruction 29. See *Cool* v. *United States,* 409 U.S. 100 (1972), where this Court reversed because of an erroneous jury instruction despite numerous correct statements of the applicable law at length elsewhere in the jury charge.

3.

**Application to petitioner of 18 U.S.C. 1623 (false declarations before grand jury or court) instead of the general perjury statute, 18 U.S.C. 1621, within the unbridled discretion of the prosecution, deprived petitioner of his constitutional right to equal protection of the laws, since the more general perjury statute, which is also applicable, puts the government to a greater burden of proof to establish violation of the law.**

Petitioner was indicted and convicted under 18 U.S.C. Sec. 1623, a recently enacted section which specifically denounces false material declarations under oath before a grand jury or court. However, equally applicable to his alleged false statements would have been 18 U.S.C. Sec. 1621, the more general perjury statute, making it a crime to give false material testimony after having taken an oath before a competent tribunal, officers, or person. (Both statutes are set forth in full at p. 4, *supra.*)

That false material declarations before a grand jury, although specifically covered by Sec. 1623, may nonetheless properly be prosecuted under the more general statute, Sec. 1621, has been recognized in *United States* v. *Kahn,* 340 F.Supp. 485 (S.D.N.Y. 1971), *aff'd,* 472 F.2d 272, 282-83 (2 Cir. 1973).

Since the burden of proof upon the government to establish violation of Sec. 1621 is much greater than that imposed by Sec. 1623, petitioner's constitutional right to equal protection of the laws was violated by prosecuting him under Sec. 1623, where no standards are set forth for differentiation, and pure prosecutorial discretion constitutes the sole basis for selecting the charge to be placed.

Although Sec. 1621 does not itself refer to the requisite burden of proof or to the so-called "two witness" rule, the case law is well-settled and abundantly clear that to establish perjury under Sec. 1621, the falsity of *each* allegedly false statement must be proven either by the testimony of two witnesses or by that of one witness together with corroborating (usually documentary) circumstances. *Weiler* v. *United States*, 323 U.S. 606 (1945); *United States* v. *Rivera*, 448 F.2d 757 (7 Cir. 1971).

The two-witness rule is strictly applied. In *Paternostro* v. *United States*, 311 F.2d 298 (5 Cir. 1962), the court reversed and remanded defendant's perjury conviction for insufficiency of proof, since the objective falsity of each of defendant's several allegedly false statements was testified to by only one witness.

In the case at bar, the "objective falsity" of each of petitioner's allegedly false declarations was sought to be established at trial by the testimony of only one witness. Thus, had he been on trial under Sec. 1621, the judicially imposed greater burden of proof would have precluded his conviction upon like evidence.

Section 1623, on the other hand, specifically recognizes the two-witness rule and purports to abolish it,[10] thus permitting conviction upon evidence which would be insufficient in law to establish a violation of Sec. 1621.

Absent any tangible standards or guidelines, it violated petitioner's constitutional guarantee of equal protection of the laws to be prosecuted for false declarations under

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[10] Sec. 1623(e) provides:

"Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

Sec. 1623 rather than for perjury under Sec. 1621, where both sections were applicable to his alleged false statements,[11] and where the effect upon his trial was so immense as to permit conviction upon the evidence presented under Sec. 1623 while that same evidence would not sustain a conviction under Sec. 1621.

The Court of Appeals agreed with the Second Circuit's decision in *United States* v. *Ruggiero,* 472 F.2d 599, 606 (2 Cir. 1973), in rejecting petitioner's contention that he was denied equal protection of the laws by virtue of having been prosecuted under Sec. 1623 rather than Sec. 1621 (App. A, p. 7) *Ruggiero* specifically held that: "[W]here criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants." *Ibid.* Petitioner herein has alleged that application of Sec. 1623 within the Northern District of Illinois, Eastern Division, has been restricted to cases against policemen,[12] thus bringing his case without the ambit of *Ruggiero.*

This Court should grant certiorari to determine the constitutional propriety of proceeding under Sec. 1623 rather than Sec. 1621 where both are applicable, where no standards or guidelines exist against which to judge the prosecutor's decision, and where conviction may be had under Sec. 1623 upon evidence which would be insufficient as a matter of law to support conviction under Sec. 1621. Such questions concerning prosecutions which could be brought under either section constitute important questions of fed-

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[11] Even the trial judge referred to the offense as "perjury." (A. 7).

[12] Petitioner's Reply Brief in No. 73-1691, filed in the Court of Appeals, p. 12.

eral law which have not, but should be, resolved by this Court. See Supreme Court Rule 19(1)(b).

Because petitioner's conviction was obtained in violation of his right to equal protection of the laws, the judgment should be reversed.

**4.**

**The court improperly determined that petitioner's alleged false statements were material as a matter of law to the grand jury investigation, where the grand jury's inquiry of petitioner was not pursuant to any legitimate grand jury function, since the grand jury already had sufficient information from independent sources upon which to indict petitioner without summoning him; therefore, the element of materiality is lacking. Moreover, the grand jury acted in bad faith, as illustrated by its asking petitioner about matters as to which the statute of limitations for substantive criminal prosecution had expired, and by asking him anything at all under the circumstances, since the grand jury already knew what it wanted to know from independent sources other than petitioner. Petitioner's conviction may not stand where the grand jury before which petitioner allegedly made false declarations was not acting as a properly constituted entity.**

At the outset, we wish to state that we do not contest the trial court's position that materiality within the statute is a question of law to be determined by the court. See, *e.g.*, *United States* v. *Rivera*, 448 F.2d 757 (7 Cir. 1971); *United States* v. *Parker*, 447 F.2d 826, 830 (7 Cir. 1971). This concept was embodied in the court's charge to the jury. (Tr. 462-63.) However, we urge that the court's conclusion that the statements were "material" as a matter of law (Tr. 463) was incorrect because the grand jury was not pursuing a legitimate function.

• • •

The grand jury which questioned petitioner was not pursuing any legitimate investigative function, since it already had the information it purportedly sought from petitioner. Therefore, no questions or answers were "material," and petitioner's conviction cannot stand.

> " 'The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation and, if it does, an indictment for perjury may be predicated upon it.' " *United States* v. *Collins*, 272 F.2d 650, 653 (2 Cir. 1959), quoting from *Carroll* v. *United States*, 16 F.2d 951, 953 (2 Cir. 1927).

However,

> "The grand jury's scope of inquiry . . . is not limited to events which themselves may result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity . . ." *United States* v. *Cohn*, 452 F.2d 881, 883 (2 Cir. 1971).[13]

Reversing defendant's perjury conviction in part, the Second Circuit in *United States* v. *Freedman*, 445 F.2d 1220 (2 Cir. 1971), addressed itself to the materiality requirement, particularly that aspect concerning "leads" as noted above:

> "We do not believe, and it is not seriously argued, that every knowingly false statement under oath is perjurious, for such a ruling would eliminate the materiality requirement. . . . [A] second essential element in establishing materiality . . . is that the "further investigation' of which . . . [the cases] speak must have

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[13] The Court of Appeals' decision on this issue rests upon this proposition. (App. p. 8). While agreeing with it in the abstract, petitioner maintains it is inapplicable to the facts herein.

> some probative value connected with the scope of the inquiry. That is to say, *in order for a knowingly false statement to be material* within the purview of § 1621, *it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred.* Proof of this was absent at trial and we repeat once again that the materiality of a false statement must be proved to sustain a perjury conviction." *Id.* at 1226-27. (Emphasis added.)

In the case at bar the grand jury did not seek to develop any "leads"; petitioner was not asked about any knowledge he might have had concerning "official corruption" involving other police officers; only his *own* conduct was put to the question. (Tr. 192-210).[14] And as to his own conduct, the grand jury obviously already had heard from the four individuals who testified against petitioner at trial to the effect that they, as tavern owners, had paid him for official favors. Thus, even if petitioner had given answers considered by the grand jury to have been "truthful," no further fruitful investigation would have occurred. The grand jury already had, from independent sources all the information it was attempting to secure from the mouth of petitioner.

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[14] Nowhere in the grand jury testimony was petitioner asked any questions concerning his possible knowledge of illegal activity by other police officers; the inquiry was *solely* directed at his *own* conduct. This precludes any possible application of the "leads" theory of materiality to the facts of this case.

Moreover, as to taverns concerning which petitioner admitted knowledge of their existence, petitioner was questioned no further. (See Gr. J. Tr. 38-40). This further demonstrates the grand jury's bad faith; petitioner was indicted *only* as to those establishments concerning which he disclaimed any knowledge whatsoever. (See Tr. 197-210)

Hence, the questions and answers are not "material" and therefore, allegedly false answers are not punishable either as perjury under Sec. 1621 or as false statements under Sec. 1623.

In *United States* v. *Icardi,* 140 F.Supp. 383 (D.D.C. 1956), the court granted defendant's motion for a directed verdict of acquittal, holding that defendant's allegedly false answers were not material because they could have had no effect upon the Congressional Sub-committee's report, inasmuch as the investigative agency already had all the information which it attempted to extract from defendant. *Id.* at 388-89.

Similarly, in *United States* v. *Cross,* 170 F.Supp. 303 (D.D.C. 1959), the court granted defendant's motion for judgment of acquittal, since the Senate Select Committee before which he allegedly committed perjury already had all the information it sought. The court noted that if defendant had admitted the conduct concerning which he had been questioned, this would merely have corroborated information the Committee already had. Therefore, there was no proof that defendant's allegedly false testimony was material, and he could not be convicted of perjury. *Id.* at 309-310.

In *Brown* v. *United States,* 245 F.2d 549 (8 Cir. 1957), the court reversed defendant's conviction with directions to dismiss for insufficiency of evidence (*id.* at 556) where the grand jury already had the information it purportedly sought from defendant; under these circumstances, the court held, the inquiry was not material: "Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency." *Id.* at 555.

Because the grand jury before which petitioner allegedly made false statements already had, from independent sources, sufficient information to indict petitioner, and because even answers which that grand jury would have deemed truthful would not have aided its investigation, petitioner's allegedly false statements were not material under prevailing law. Therefore, his conviction must be reversed.

Moreover, the Special February 1971 Grand Jury, when questioning petitioner, was acting in bad faith and therefore was not acting as a properly constituted entity. As is evident from the nature of the questioning, the only possible purpose for questioning petitioner was to attempt to extract what the Grand Jury believed to be perjurious statements from petitioner so that he could be prosecuted therefor.

First of all, the specific incidents about which the grand jury questioned defendant in 1972 had all taken place, if at all, so long before the questioning that the statute of limitations had already expired as to any substantive violation which could have been brought out by his testimony. We recognize that a perjury conviction may stand even if the perjury was related to "events which had occurred prior to the limitations period," *United States* v. *Cohn*, 452 F. 2d 881, 883 (2 Cir. 1971), and we do not maintain that this in itself precludes the conviction in this case. However, we use this factor to illustrate the grand jury's bad faith in pursuing its investigation of petitioner under the circumstances. And here the grand jury was not seeking "valuable leads for investigation of suspected criminal activity during the limitations period," *ibid.*, as is evident from the questions put to petitioner. (Tr. 192-210)

Most significant is the fact that, when petitioner was questioned, the grand jury already knew from independent sources what it sought to extract from him. (See pp. 4-24, *supra.*) Thus the grand jury's only purpose in questioning defendant was to try to get him to perjure himself.

Moreover, some of the questions put to petitioner pertained to a tavern *which did not even exist* at that location or under that name during the time petitioner served in the District under inquiry,[15] further demonstrating the grand jury's bad faith.

As in *Brown* v. *United States,* 245 F.2d 549 (8 Cir. 1957), where the grand jury already had the information it purported to seek from defendant,

> "Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." *Id.* at 555.

The court in *Brown* condemned the grand jury's conduct, and reversed defendant's perjury conviction.

Similarly, in both *United States* v. *Icardi,* 140 F.Supp. 383 (D.D.C. 1956), and *United States* v. *Cross,* 170 F.Supp. 303 (D.D.C. 1959), the courts acquitted defendants of perjury before legislative committees where, because the information sought from defendant was already available

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[15] While petitioner was asked about a Johnnie Lee Davis at a J & P Lounge at 4423 W. Madison St., and denied any knowledge of a Davis or of a J & P Lounge at that address (Tr. 197-99), it was clear from Davis' trial testimony that during the years in question, he (Davis) was associated with an entirely different lounge at a wholly different address—about which petitioner was never questioned—and owned the J & P Lounge—about which petitioner was questioned and disclaimed knowledge—only for the past three years, after petitioner had been re-assigned. (Tr. 137-38; 195-96)

from other sources, no valid purpose was served by questioning defendants. In each case, the court held that under such circumstances, the investigative body was not functioning as a competent tribunal when it questioned each defendant. 140 F.Supp. at 388; 170 F.Supp. at 309-10.

Clearly the same standards apply to grand juries as to legislative committees; indeed, the court in *Brown, supra,* a grand jury case, quoted from and relied on *Icardi, supra,* a Congressional committee case. See 245 F.2d at 555.

Because the grand jury which questioned petitioner obviously was not trying to gain useful information from him, but rather was putting him in a position either to commit perjury (as they saw it) or lose his job,[16] it was not functioning as a competent entity. Therefore, under the foregoing authorities and pursuant to traditional concepts of justice and fair play, his conviction procured under these circumstances must not be permitted to stand.

This Court has not had occasion to speak to the element of "materiality" vis a vis the grand jury's good or bad faith, or to the question whether the grand jury's lack of good faith, as demonstrated herein, removes from that body the essential quality of being a competent entity such that a false statement to it is punishable under applicable law. Resolution of such important questions of federal law which have not been, but should be, decided by this Court, could be accomplished by granting certiorari in the case at bar. See Supreme Court Rule 19(1)(b).

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[16]At the time of petitioner's grand jury appearance, Chicago Police Officers who invoked the Fifth Amendment before a grand jury were suspended or discharged pursuant to Rule 51 of the Rules & Regulations of the Chicago Police Department. See Point 6, *infra.*

**5.**

**The evidence was insufficient, since there was no evidence that petitioner believed his answers (that he did not recall or did not remember certain things) to be false when he gave them; there is nothing in the record other than bald conjecture to support the conclusion that when he gave those answers, petitioner did not believe them to be true.**

Conviction for perjury may stand on "don't remember" or "can't recall" answers, if, in addition to the other matters which must be proven, it is affirmatively established that when he gave such answers, defendant believed them to be false, *i.e.*, that in fact, when questioned, he did remember or recall. See *United States* v. *Nicoletti*, 310 F.2d 359 (7 Cir. 1962).

In the case at bar, no evidence, other than the evidence purporting to show four specific incidents wherein petitioner allegedly accepted money from tavern owners for official favors in his capacity as a police officer, tended to show that when he denied remembering such incidents, petitioner in fact remembered them.[17] The specific incidents allegedly took place from 5 or 6 to 8 or more years before his grand jury testimony.

> "Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself. In some cases perhaps this might not be so—as where

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[17]Moreover, during the years petitioner worked as a police officer in the Austin District, one of the establishments concerning which petitioner denied knowledge did not even exist under the name or at the address furnished to petitioner during questioning before the grand jury. See footnote 15, p. 25, *supra*. Yet he stands convicted for having denied taking money from a person at a tavern which did not exist during his years in that District.

the testimony concerned a triviality or an occurrence of long ago." *Young* v. *United States*, 212 F.2d 236, 241 (D.C. Cir. 1954).

In several cases, perjury and false declaration convictions have been reversed because in each case, it was held that defendant's answers that he did not remember were not proven to have been false when he gave them.

In *Fotie* v. *United States*, 137 F.2d 831 (8 Cir. 1943), defendant had been convicted of perjury, where the allegedly perjurious answers involved his not remembering that he had previously sworn that he was born in Italy. The court reversed, holding:

> "Necessarily the recollection of a witness must be shown by circumstantial evidence. But it is not enough that the evidence raise an inference of guilt. In view of the requirement that proof of appellant's recollection of the incident which he denied recollecting must establish the fact of his guilt beyond a reasonable doubt, *something more is necessary to convict than proof that the act, not remembered, did in fact occur.*" *Id.* at 842. (Emphasis added.)

In *United States* v. *Clizer*, 464 F.2d 121 (9 Cir. 1972), the court reversed in part defendant's conviction under Sec. 1623, where the allegedly false testimony was that defendant did not remember having seen or said certain things, and there was evidence that he had seen and said those things which he denied remembering having seen and said. Reversing Count III, which depended on these "don't remember" answers, the court held that the circumstantial evidence tending to show that defendant did in fact remember was insufficient to sustain the conviction. *Id.* at 125.[18]

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[18] The Court of Appeals' conclusion that the circumstantial evidence in the case at bar is "substantially greater than that presented in" *Clizer, supra,* (App. A. p. 10), is patently erroneous.

In the case at bar, in addition to the length of time (up to 8 years) which had elapsed between the alleged incidents and petitioner's testimony denying recollection of them, there is also the fact that petitioner had accepted money—legitimately—from businessmen for meritorious conduct in the course of his duties as a police officer. (Tr. 378-83) Further, petitioner testified concerning legitimate remuneration for special services rendered, such as guard duty or transferring money for a bank. (Tr. 207-08) Thus, when petitioner stated that he did not recall whether he had accepted money from anyone in the course of his police duties during specified years, it is possible that he could not remember whether or not he had received any such legitimate remuneration during those years.

In *Conrad* v. *United States,* 255 F.2d 247 (5 Cir. 1958), defendant, a policeman, was convicted of perjury for allegedly having denied certain conduct (participation in a graft system in the New Orleans police force). The Court of Appeals reversed, perceptively stating:

> "[A] reading of this record leaves the instantaneous and ineradicable impression that while appellant was engaging in an awkward, clumsy, unimpressive and oft-times ludicrous, coy, disingenuousness, he told . . . [the] Grand Jury substantially what is now claimed he denied." *Id.* at 249.

Similarly, this Court has recently held that conviction for violation of Sec. 1621 cannot be sustained where the statement is literally true, even if unresponsive or false by implication or omission. *Bronston* v. *United States,* 409 U.S. 352 (1973). *Accord, United States* v. *Diogo,* 320 F.2d 898, 909 (2 Cir. 1963); *United States* v. *Lozano,* No. 74-1053 (7 Cir., decided February 18, 1975), sl. op. p. 6 (both cases reversing convictions for having made false statements to immigration authorities, where statements were literally true).

Looking at petitioner's grand jury testimony, which includes such statements as: "I can't remember anybody that I have taken any money from. Now that is the answer to that question, and that is the God's truth. I can't remember anybody, anyone who I have taken money from. I can't remember them." (Tr. 206-07)—it appears that he may implicitly thereby literally *admit* that he took money, denying *only* being able to *remember* any of the persons he may have taken money from.

And who can say he can remember?

In any event, the evidence was wholly insufficient, under all the standards above set forth, to establish that petitioner in fact did recall the incidents he denied being able to recollect.[19] As this is an essential element of the offense, petitioner's conviction must be reversed.

Certiorari should be granted so that this Court may pass on the legal sufficiency of evidence to support conviction under Sec. 1623 based upon "don't remember" and "can't recall" answers to questions put by a grand jury.

**6.**

**Petitioner was convicted solely on the basis of his grand jury testimony which was coerced in violation of his Fifth Amendment rights by virtue of Chicago Police Department Rule 51, since declared unconstitutional.**

After the briefing herein was completed, but before oral argument, the Court of Appeals for the Seventh Circuit declared unconstitutional Chicago Police Department's Rule

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[19] Of course, petitioner also urges that insufficiency of the evidence with regard to the element of "oath" is fatal to his conviction as well. See Point I B, pp. 9-11, *supra*.

51, pursuant to which an officer could summarily be discharged or suspended for having exercised his Fifth Amendment privilege to remain silent when summoned before a grand jury. *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7 Cir. 1973). The parties were permitted to argue concerning the effect, if any, of petitioner's having been subject to said Rule when summoned before the grand jury in the case at bar and the Court of Appeals rejected petitioner's contentions.[20]

Regardless of the Court of Appeals' rationalizations to the contrary, (App. A, p. 13) petitioner stands convicted solely on the basis of testimony which was in fact coerced from him in violation of his Fifth Amendment privilege against self-incrimination.

A decision favoring petitioner's constitutional argument herein would not wreck havoc in the courts, inasmuch as Rule 51 has been declared unconstitutional; such a ruling would affect only those unfortunate police officers who, like petitioner, were faced with the unconstitutional options during grand jury questioning which took place prior to the *Confederation of Police* decision, *supra*.

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[20] Petitioner argued: "(1) at the time he testified Rule 51 was in force and effect and represented a clear threat of discharge or suspension if he refused to testify; (2) his testimony was therefore coerced in the same sense as was the testimony in *Garrity* [*Garrity* v. *New Jersey*, 385 U.S. 493 (1967)] because he was faced with the prospect of disciplinary action if he refused to testify; (3) the coerced testimony was subsequently used against him as an essential part of the Government's case-in-chief, and was the sole basis for his conviction; and (4) since 'the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office,' 385 U.S. at 500, his conviction should be reversed." (App. A. p. 12)

Despite the Court of Appeals' implication to the contrary (App. A, p. 12-13), petitioner does not argue that the existence of the unconstitutional regulation should be held to operate as a license to lie to the grand jury; instead, petitioner merely seeks a holding that testimony in effect coerced because of the Rule's existence at that time must not, consistent with the Constitution, be permitted to form the *sole* basis of conviction.

Petitioner presently stands convicted solely on the basis of testimony extracted from him in violation of his Fifth Amendment privilege against self-incrimination.

Certiorari should be granted to consider this substantial constitutional contention involving interpretation and application of the Fifth Amendment to a conviction based solely upon evidence obtained only because of the previous existence of a local police department Rule which subsequently was declared unconstitutional.

## CONCLUSION

To resolve the many issues involving important questions of federal law which have not been, but should be, decided by this Court, certiorari should be allowed; and upon review, petitioner's conviction should be reversed, or reversed and remanded.

Respectfully submitted,

JULIUS LUCIUS ECHELES
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# APPENDIX

# APPENDIX

## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

No. 73-1691

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

ROBERT F. DEVITT,

*Defendant-Appellant.*

ARGUED DECEMBER 6, 1973—DECIDED JULY 2, 1974

Before HASTINGS, *Senior Circuit Judge,* KILEY, *Senior Circuit Judge,* and CAMPBELL, *Senior District Judge.*

CAMPBELL, *Senior District Judge.* Defendant Robert F. Devitt, a Chicago police officer, was indicted in a one count indictment for having made false statements before a grand jury in violation of 18 USC §1623. Upon the jury's verdict of guilty, defendant was sentenced to three years' imprisonment.

The indictment charged that the defendant:

> "did knowingly declare in substance before said Grand Jury with respect to the aforesaid material matters that he did not recall, remember, or have any knowledge, while in the performance of his duties as a Chicago police officer of ever accepting money from

any person; that he did not recall, remember, or have any knowledge while in the performance of his duties as a Chicago police officer, of ever having accepted any money from any owner, operator, employee or agent of any tavern or business."

18 U.S.C. §1623 provides, in pertinent part:

"a) Whoever under oath in any proceeding before [a] . . . grand jury . . . knowingly makes any false material declaration . . ., shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

• • •

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

At trial, the government presented testimony of four witnesses, each of whom operated a tavern in Chicago, Illinois, and each of whom testified to having paid money to defendant while Devitt was in the performance of his duties as a Chicago police officer. Defendant testified in his own behalf and denied receiving any such payments.

Defendant's first contention on appeal is that the indictment did not sufficiently allege, and the evidence was insufficient to prove, that, at the time he appeared before the grand jury, defendant was under oath administered by one authorized by law to administer oaths. The indictment in the instant case charged that defendant knowingly made a false material declaration "while under oath as a witness before the Special February 1971 Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Northern District of Illinois . . .". The indictment clearly alleged that defen-

dant was under oath at the time he made the alleged false material declarations. The fact that the indictment does not allege that the oath was "administered by one authorized by law to administer oaths" is of no consequence. 18 USC §1623 contains no such requirement.

Regarding the sufficiency of the evidence, the Justice Department attorney present during the grand jury proceedings testified at trial that Devitt was administered the oath by the foreman of the grand jury on February 23, 1972. The transcript of Devitt's testimony was subsequently introduced into evidence. We find no merit to defendant's contention that this evidence was insufficient to prove that he testified under oath.

## INSTRUCTIONS

We also reject defendant's assertion that the trial court invaded the province of the jury in failing to instruct the jury that the defendant must be found to have been under oath administered by one competent to administer oaths. As previously noted, 18 USC §1623 requires neither that the indictment allege nor that the government prove that the accused took an oath "administered by one authorized by law to administer oaths". Moreover, defendant neither objected to the instructions relating to the administration of the oath nor tendered to the district court proposed instructions reflecting the position now advanced on appeal.

Defendant also argues that Instruction 29 was erroneous because it did not require that Devitt be found to have accepted money from any one or more of the tavern owners named in the indictment "in the performance of his duties as a Chicago police officer", as alleged in the indictment. The instructions, in their entirety, repeatedly ad-

vised the jury that defendant must be found to have accepted money "in the performance of his duties as a Chicago police officer", and viewed in their entirety, we find the instructions to the jury more than adequate. *United States* v. *Esquer,* 459 F. 2d 431, 435 (7th Cir. 1972).

## MATERIALITY

To sustain a conviction under 18 USC §1623, the defendant's false declarations must be "material". Conceding that the issue of materiality under 18 USC §1623 is a question of law to be determined by the court, *United States* v. *Wesson,* 478 F. 2d 1180, 1181 (7th Cir. 1973); *United States* v. *Rivera,* 448 F. 2d 757 (7th Cir. 1971); *United States* v. *Parker,* 447 F. 2d 826, 830 (7th Cir. 1971), defendant contends that his allegedly false declarations were not material, as a matter of law, for two reasons:

(1) The grand jury's inquiry pertained to "purely local conduct", and was therefore not a proper subject for investigation under the Hobbs Act, 18 USC §1951.

(2) The grand jury's examination of the defendant "was not pursuant to any legitimate grand jury function" because the grand jury had already amassed information from independent sources sufficient to seek an indictment against defendant without summoning him.

Contending that the grand jury's investigation "involved nothing more than alleged 'pay-offs' by tavern owners to policemen" and that the "Hobbs Act, 18 USC Sec. 1951 cannot properly be applied to such purely local activities", defendant argues that the questions asked of him during that investigation were not "material". The underlying proposition advanced by defendant—that the

conduct under investigation was not properly subject to federal criminal jurisdiction—has previously been rejected by this court in *United States* v. *DeMet,* 486 F. 2d 816 (7th Cir. 1973). There, confronted with the same arguments now advanced by Devitt, the court held that "Section 1951 clearly contemplates a full application of the commerce power. It proscribes extortion which 'in any day or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . .'." 486 F.2d at 821.

The *DeMet* court found that commerce had been affected by the same kind of extortionate activities which were under investigation by the grand jury in the instant case. Moreover, the victims of extortion in *DeMet* were, as here, retail liquor establishments. Judge Fairchild, speaking for the court, rejected the argument that commerce had not been affected, holding that:

> "Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstruction and delay of, and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by this fulfillment of the extortionate demands or the harm which would follow if the threats were carried out." 486 F. 2d at 822.

Since the grand jury's investigation concerned conduct which might properly be made the subject of federal criminal prosecution, defendant's false testimony concerning such activities was not immaterial.

Defendant's second contention respecting materiality is that the allegedly false testimony did not influence, impede or dissuade the grand jury in connection with its investigation. Defendant argues that the questions directed to him

did not concern "official corruption" generally, but rather were limited solely to his conduct while in the performance of his duties as a Chicago police officer. Since the grand jury had previously heard testimony from the four tavern owners who ultimately testified against defendant during his trial, defendant maintains that no further "fruitful investigation" would have resulted from truthful responses to the questions asked of him by the grand jury.

False testimony before the grand jury is material if it "has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation. *United States* v. *Stone,* 429 F.2d 138, 140 (2nd Cir., 1970), and cases cited therein. Moreover, if the false statement "potentially interferes with the grand jury's line of inquiry, materiality is thereby established even though the perjured testimony does not actually impede the investigation." *United States* v. *Wesson,* 478 F.2d 1180, 1181 (7th Cir., 1973). See also, *Vitello* v. *United States,* 425 F.2d 416, 424 (9th Cir. 1970); *United States* v. *Henderson,* 185 F. 2d 189, 191 (7th Cir. 1950).

In the instant case, the grand jury was engaged in an investigation of possible extortionate conduct by certain Chicago Police Department personnel in violation of the Hobbs Act. Defendant's false declarations potentially interfered with and impeded that investigation insofar as defendant's false answers rendered further inquiry on the subject a meaningless exercise. Had defendant answered honestly, the grand jury would have been advised that he had, in fact, accepted money from tavern owners while in the performance of his duties as a Chicago police officer. The grand jury would then have been in a position to determine the identity of other extortion victims, if any, who had not previously been identified. Potentially, honest responses to the questions asked of defendant might have

led to a determination of the identity of other police officers, if any, engaged in similar practices.

In short, the fact that the questions which defendant failed to answer truthfully related only to *his* conduct as a Chicago police officer is not dispositive. Truthful answers to those questions might well have served as the foundation for a more "fruitful investigation" into the broader subject matter of the grand jury's inquiry. Accordingly, we find that the district judge correctly determined the materiality of Devitt's allegedly false statements.

## EQUAL PROTECTION

Defendant next claims that he was denied equal protection of the law because he was indicted and convicted under 18 U S C § 1623 (proscribing false material declarations before a grand jury or a court) rather than 18 U S C § 1621 (perjury). Defendant argues that § 1621 has been construed to require that the falsity of each allegedly perjurious statement be proven either by the testimony of two witnesses or by the testimony of a witness, corroborated by other evidence. *United States* v. *Rivera,* 448 F.2d 757 (7th Cir. 1971).

§ 1623 specifically provides that the "two-witness rule" is not applicable to prosecutions thereunder:

> "It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." 18 USC § 1623(a).

Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or more separate criminal statutes, the government must elect to prosecute under the statute imposing the greatest burden of proof. As did the court in *United States* v. *Ruggiero,* 472 F.2d 599, 606 (2d Cir. 1973), we find defendant's con-

tention in this regard entirely without merit. If anything, the government would be expected to proceed under § 1623 rather than § 1621, on the ground that a statute aimed at specific conduct prevails over an otherwise applicable general statute. See, *United States* v. *Kahn*, 472 F.2d 272 (2d Cir. 1973).

## BAD FAITH

Defendant argues that he was questioned by the grand jury regarding matters as to which the statute of limitations pertaining to substantive criminal prosecution had expired. Conceding that the grand jury may seek information which predates the applicable limitation period, *United States* v. *Cohn*, 452 F.2d 881, 883 (2d Cir., 1971), defendant nonetheless contends that, in the instant case, inquiry along these lines constituted bad faith conduct by the grand jury, since the information sought had already been obtained from sources other than the defendant. Defendant concludes that the sole purpose of calling him before the grand jury was "to try to get him to perjure himself" and that since the grand jury was not attempting to seek useful information in connection with its investigation, "it was not functioning as a competent entity."

We need not reiterate what has been said regarding the materality of defendant's testimony. Suffice it to say that because truthful answers potentially could have led to a more fruitful investigation, the grand jury's inquiry cannot be viewed merely as a device to "get him to perjure himself". As the court stated in *United States* v. *Cohn*, supra, the scope of the grand jury's inquiry "is not limited to events which themselves may result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity during the limitations period." 452 F.2d

881, 883. See also, *United States* v. *Wesson*, 478 F.2d 1180, 1181 (7th Cir. 1973).

The record in the instant case does not support defendant's assertion that the grand jury was not attempting to obtain useful information in furtherance of its investigation. Consequently, we find no basis for the speculative conclusion that the grand jury was acting in bad faith.

## SUFFICIENCY OF THE EVIDENCE

Devitt's allegedly false statements consisted of declarations that he had no knowledge of, or could not recall, any instance in which he had accepted money from any tavern owner while in the performance of his official duties as a Chicago police officer. Defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that at the time he testified, he knew his answers to be false. Defendant relies heavily upon the fact that the incidents regarding which the government's witnesses testified predated his testimony by as much as eight years, and intimates that defendant might have confused these incidents with those in which he accepted gifts legitimately from local businessmen for "meritorious service".

Whether defendant knew at the time he testified that his statements were false may be proven by circumstantial evidence, *United States* v. *Nicoletti*, 310 F.2d 359 (7th Cir. 1962), and "generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself." *Young* v. *United States*, 212 F.2d 236, 241 (D.C. Cir. 1941). Although the testimony of the tavern owners did not directly establish that defendant actually remembered receiving money from them, their testimony did establish that the money was paid to the defendant while in the performance of his duties as a Chicago police officer. These witnesses testified in detail regarding veiled

threats made by defendant to the effect that he would use his official position to their economic detriment unless he was paid a certain sum of money. Each witness testified that money was subsequently paid to the defendant. Defendant testified in his own behalf and denied accepting money from any of the four tavern owners. On cross examination, he testified that if he had ever "shaken down any taverns", he would remember it. The jury apparently concluded that, contrary to his testimony at trial, defendant had accepted money from the four tavern owners and that he remembered doing so. We find the circumstantial evidence here substantially greater than that presented in *United States* v. *Clizer,* 464 F.2d 121 at 125 (9th Cir. 1971), and viewed in the light most favorable to the appellee, sufficient to prove beyond a reasonable doubt that at the time defendant testified before the grand jury he knew his testimony to be false.

## CHICAGO POLICE DEPARTMENT RULE 51

Approximately one week before oral argument in the instant appeal, this court decided *Confederation of Police, Et. Al* v. *James B. Conlisk, Et Al,* 489 F.2nd 891 (7th Cir. 1973), holding Chicago Police Department Rule 51 unconstitutional. Rule 51 prohibited Chicago police officers from:

> "Failing to give evidence before the Grand Jury . . . when properly called upon to do so, or refusing to testify on the grounds that such testimony might incriminate the member, or refusing to sign a waiver of immunity when requested to do so by a superior officer."

Each of the plaintiffs in *Confederation of Police* was a police officer who had invoked the privilege against self-incrimination and refused to testify before a federal grand

jury. Plaintiffs were thereafter either suspended or discharged for violating Rule 51.

After tracing the development of the law from the Supreme Court's decision in *Garrity* v. *New Jersey*, 385 U S 493 (1967), to its decisions in *Gardner* v. *Broderick*, 392 U S 273, (1968) and *Uniformed Sanitation Men Ass'n, Inc.* v. *Commissioner of Sanitation*, 392 U S 280 (1968), this court held that "Rule 51, to the extent that it denies police officers the privilege against self-incrimination where criminal prosecution may follow, is constitutionally invalid." 489 F.2nd at 895.

Where a public employee testifies before a grand jury under the threat that his refusal to testify will result in disciplinary proceedings against him, the use of evidence so obtained against that witness in a subsequent criminal prosecution is improper. "[T]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Garrity* v. *New Jersey*, 385 U S at 500.

Nor may disciplinary action be taken against the witness for his refusal to testify, unless he is first advised that, consistent with the holding in *Garrity*, evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings. *Gardner* v. *Broderick, supra; Uniformed Sanitation Men Ass'n., Inc.* v. *Commissioner of Sanitation, supra.*

In *Confederation of Police*, where the plaintiffs were suspended or discharged for refusing to testify after being first advised that anything they said *could* be used against them in subsequent criminal proceedings, the disciplinary action taken against them was held to be constitutionally infirm under the holdings in *Gardner* and *Sanitation Men:*

> "These discharges were clearly unconstitutional under the rulings of *Gardner* and *Uniformed Sanitation Men.* The IAD inquiry was in no sense an 'accounting of public faith' as the questions were not 'specifically, directly, and narrowly' related to official duties and the officers were not advised that their answers would not be used against them in criminal proceedings." *Confederation of Police* v. *Conlisk,* 489 F.2nd at 895.

In the instant case, defendant argues that (1) at the time he testified Rule 51 was in force and effect and represented a clear threat of discharge or suspension if he refused to testify; (2) his testimony was therefore coerced in the same sense as was the testimony in *Garrity* because he was faced with the prospect of disciplinary action if he refused to testify; (3) the coerced testimony was subsequently used against him as an essential part of the Government's case-in-chief, and was the sole basis for his conviction; and (4) since "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office", 385 U S at 500, his conviction should be reversed.

We believe defendant's reliance upon the aforementioned decisions is misplaced. Had defendant admitted extorting money from tavern owners, neither his testimony nor the fruits thereof could have been used against him in a subsequent prosecution. *Garrity* v. *New Jersey, supra.* Had he exercised his Fifth Amendment privilege, he could have attacked the legality of any subsequent disciplinary action against him on the basis of *Gardner* and *Sanitation Men.* But we find nothing in these decisions or in this court's holding in *Confederation of Police* which grants a witness before the grand jury the third alternative which, in substance, is proposed by the defendant in the instant case: the right under such circumstances to

knowingly make a false material declaration while testifying under oath before a grand jury.

As the Second Circuit Court of Appeals stated in *United States ex rel. Annunziato* v. *Deegan,* 440 F.2nd 304 (2nd Cir. 1971), upholding the conviction of a public employee for perjury based upon testimony obtained under threat of discharge:

> "[A]ppellant was not prosecuted for *past* criminal activity based on what he was forced to reveal about himself; he was prosecuted for the *commission of a crime while testifying,* i.e., perjury. In short, while a public employee may not be put to the Hobson's Choice of self-incrimination or unemployment, he is not privileged to resort to the third alternative, i.e., lying." 440 F.2nd at 306.

In sum, *Garrity* and its progeny do not proscribe the use, in a criminal prosecution under 18 U S C §1621 or §1623, of a defendant's allegedly perjurious statements, even if obtained under circumstances such as those of the instant case. *Garrity* provides the witness with adequate protection against the government's use, in subsequent criminal proceedings, of information obtained as a result of his testimony, where his refusal to testify would form the basis for disciplinary action against him. *Gardner* and *Sanitation Men* provide the witness with a shield against such disciplinary action based upon his refusal to testify, in cases in which he refuses to do so, believing that his testimony or the fruits thereof can be used against him in subsequent criminal proceedings.

Together, these decisions provide adequate protection of the witness's Fifth Amendment rights. We find no reason or justification for extending this umbrella of protection to shield a witness against prosecution for knowingly giving false testimony.

The judgment of the district court is therefore affirmed.

AFFIRMED.

## APPENDIX B

January 28, 1975.

It is hereby ordered the Petition for Rehearing be denied.